engineering codes should generally provide a good basis for safety, engineering, and reliability standards. However, these national codes may not take into account local conditions (e.g., wind load, ice load, etc.) that could be in excess of the environmental conditions postulated in the national codes. Local tort law may have imposed on the utility a standard of care in excess of that specified in the relevant code, particularly if accidents had occurred at a particular location or under certain severe circumstance (thus putting the utility on notice of the potentially dangerous condition). More-over, occupational health and safety rules imposed by federal or state authorities, or the terms of collective bargaining agreements, or agreements with construction contractors may require more stringent standards.[28] If the Commission adopts any safety, reliability, or engineering standards, they should be minimum standards and not maximum standards. Utilities must be free to adopt more stringent company standards, provided those standards are applied in a nondiscriminatory manner.

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[28] Many of the work rule provisions relating to electric power generation, transmission and distribution adopted by the Occupational Health and Safety Administration in 1994 are more stringent than corresponding provisions in the National Electrical Safety Code. See 29 C.F.R. § 1910.269 (1995).

Closely related to this issue is the issue of whether the utility or the communications carrier seeking attachment should have the burden of proof as to safety, reliability, capacity, and engineering issues. Ohio Edison is in agreement with utilities that telecommunications carriers should be required to present a prima facie case that the utility's denial is unreasonable.[29] Communications carriers, of course, are generally of the opposite opinion. The Commission should note that this argument is largely rhetorical. In the real world of poles and conduits, whether or not a denial is reasonable will in most cases be evident. Both the carrier seeking the attachment and the utility will put or its best factual case in Commission pleadings in a complaint proceeding, because the neither party can afford to sit on a presumption and hope that the Commission will rule that the other party has failed to carry its burden. The only instance in

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[29] Utilities stated this result in several ways. UTC/EEI and others indicated simply that the telecommunications carrier should have the burden of proof; Ohio Edison and others indicated that the utility would carry the ultimate burden of proof, but that its engineering analysis would have the benefit of a rebuttable presumption of correctness. With the utility have the benefit of a rebuttable presumption, the communications carrier would have the burden of proving a prima facie case of unreasonableness. If the carrier were successful in presenting a prima facie case, shifting the ultimate burden back to the utility. However stated, the practical result is the same.

which the burden of proof will make an actual difference are those relatively few cases in which no clear-cut result is evident. The most important practical result of formally assigning utilities the burden of proof would be that an extra round of pleading will be required with respect to capacity, safety, reliability and engineering issues, increasing the cost of complaint proceedings and increasing the administrative burden on the staff.[30] The Commission should retain its present procedural framework.

G. Normal Market Forces Will Prevent Facilities Owners From Making Unnecessary Modifications

Many communications commenters argue that the Commission should adopt rules restricting the right of facilities' owners from making modifications to their property.[31] First, Section 224 does not give the

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[30] In normal process, the complainant communications carrier, which under Commission rules generally has the burden of proof, will submit its complaint, which the utility will answer. Because it generally holds the burden of proof, the complainant gets the "last word" by way of a reply brief. If the burden of proof on capacity, safety, reliability, and engineering issues is formally shifted by Commission rule to the utility, Commission pleading rules would then permit the utility to submit a surrebuttal brief as to those issues on which it has the burden of proof.

[31] See TCG Comments at 10; Winstar Comments at 8; MCI Comments at 25 (owner should have burden of proof to demonstrate before FCC or state commission that modifications are necessary).

Commission explicit authority to adopt regulations preventing facilities' owners from modifying their facilities. Second, Section 224(i) imposes a heavy financial penalty on facilities owners that would make unnecessary modifications to their facilities, because they would be unable to collect any of the cost of those modifications from attaching entities. Finally, adoption of regulations of the sort apparently contemplated by the NOPR would certainly engulf the Commission in an unnecessary and unending firestorm of complaints in which it would be required to continually refine the definition of what constitutes an "unnecessary" or "unduly burdensome" modification.

The best course for the Commission is not to adopt any rules limiting the right of facility owners to modify their facilities. Congress clearly intended in Section 224(i) to let market forces accomplish that result. The Commission, at a minimum, should allow sufficient time to see if this economic disincentive system will prevent the abuses which the Commission might seek to prevent by means of a rule. If complaints received indicate that unnecessary or unduly burdensome modifications are truly a problem, it can then adopt

rules targeted at the specific abuses it perceives by adjudicating complaints.

IV. CONCLUSION

For the foregoing reasons, the Commission initially should proceed by adjudication rather than rulemaking in deciding issues relating to nondiscriminatory access to poles, ducts, conduits, and rights-of-way, and should take into account the suggestions noted above and in Ohio Edison's initial comments.

Respectfully submitted,

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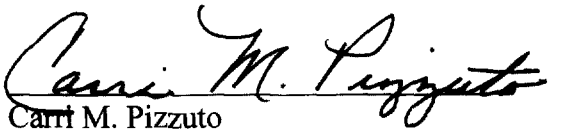

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